DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

UEC	EIVED
JOL -	7 1997
FEDERAL COMMENTER	1997

In the Matter of) OFFICE (MUNICATIONS COMMISSION OF THE SECRETARY
GUAM PUBLIC UTILITIES COMMISSION)	
Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act) CCB Pol. 96-18))	
Treatment of the Guam Telephone Authority And Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2)) CC Docket No. 97-	134

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

MCI fully supports the Commission's proposal to treat the Guam Telephone Authority (GTA) as an incumbent local exchange carrier (LEC) for purposes of section 251 of the Telecommunications Act of 1996 (Act). 47 U.S.C. § 251. There can be little dispute that GTA is an incumbent LEC under the Act. A LEC is classified as an incumbent LEC if it provided exchange service and was a member of the National Exchange Carrier Association (NECA) on the date of enactment of the Act. It is only because GTA failed to comply with the Commission's Order requiring GTA to file an

No. of Copies rec'd Off

¹ Guam Public Utilities Commission, Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act, Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, CCB Pol. 96-18, CC Docket No. 97-134 (released May 19, 1997) (Notice).

access tariff that it was not a member of NECA on February 8, 1996. Absent GTA's patent disregard for the Commission's Order, this proceeding would have been unnecessary. GTA should not be permitted to capitalize on its noncompliance with the Commission's mandate and escape section 251 obligations. GTA is precisely the type of LEC that the Act was intended to encompass.

The Act was designed to open *all* local markets to competition, affording consumers options in selecting telecommunications service providers. In order to bring about such competition, the Act was intended to eliminate regulatory, operational, and economic barriers to competitive entry. The monopoly position of the incumbent LEC is no longer protected from competition. GTA is one of the monopolies that has traditionally been protected from competition by such barriers to entry. To exempt GTA from incumbent LEC obligations would prevent potential competitors from using the procompetitive mechanisms in section 251(c), including interconnection, unbundling, and resale obligations imposed upon incumbent LECs. Requiring GTA to assume the duties of an incumbent LEC is the only result that is consistent with Congressional intent.

As the Commission has tentatively concluded, GTA satisfies the section 251(h)(2) criteria for treatment of a LEC as an incumbent for purposes of section 251. GTA's position in the market for telephone exchange service in its service area is comparable to an incumbent LEC. As the only LEC in Guam, GTA not only serves virtually all of the subscribers in its service area, but it also possesses the economies of density, connectivity, and scale that make efficient competitive entry almost impossible. GTA's network is the only existing infrastructure in Guam, access to which would facilitate competitive entry by eliminating economic and operational barriers for potential

competitors. Moreover, treatment as an incumbent LEC for GTA would also serve the public interest. Competition is necessary not only because it will eliminate GTA's control over essential facilities, but also because of the social and economic benefits that will benefit Guam consumers.

II. GUAM TELEPHONE AUTHORITY SHOULD BE TREATED AS AN INCUMBENT LEC FOR PURPOSES OF SECTION 251(H)(2)

Because GTA wrongly avoided classification as an incumbent LEC under section 251(h)(1), the Commission should issue a rule treating GTA as an incumbent LEC under section 251(h)(2). GTA would have been classified as an incumbent LEC under section 251(h)(1) if it had complied with the Commission's Order in IT&E Overseas, Inc. and PCI Communications, Inc.,² and filed an access tariff five years ago. GTA should not be permitted to circumvent the Act's requirements as a result of it's own delay tactics. MCI therefore supports the Commission's tentative conclusion that GTA satisfies the statutory criteria for treatment as an incumbent LEC for purposes of section 251.³

A. GTA Occupies a Position in the Market for Telephone Exchange Service in its Service Area that is Comparable to an Incumbent LEC

MCI agrees with the Commission's tentative conclusion that GTA satisfies the element in section 241(h)(2)(A) for treatment as an incumbent LEC because it occupies a position in Guam that is comparable to positions held by other incumbent LECs defined in section 251(h)(1).⁴ GTA holds a dominant position in its market for telephone exchange service as the sole provider of local exchange and exchange access services in

² 7 FCC Rcd 4023 (1992) (<u>Jurisdiction Order</u>).

³ Notice, ¶ 3.

⁴ Id. at ¶ 25.

Guam. GTA's status as the only LEC in its service area renders it comparable to any other incumbent LEC.

GTA possesses the characteristics of dominance that incumbent LECs generally have in the exchange service market. GTA's position as the only LEC in its service area of Guam is comparable to that of other incumbent LECs, which are typically the only LECs in their services areas. Further, as the sole provider of local exchange services in Guam, GTA possesses the economies of density, connectivity, and scale that make efficient competitive entry quite difficult if not impossible. These are traditional indices of a natural monopoly. Indeed, in its Notice, the Commission observed that GTA seems to exercise the dominance of an incumbent LEC, "which typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale."

B. A Practical Interpretation of Section 251(h)(2)(B) is Warranted

In order to avoid the absurd result of excluding GTA from the definition of an incumbent LEC and exempting it from section 251 obligations, Section 251(h)(2)(B) cannot be read to literally require that a LEC has "substantially replaced an incumbent local exchange carrier." A literal reading of this subsection would not include GTA because it has not actually replaced a previous incumbent LEC in Guam. If GTA were not treated as an incumbent LEC, GTA would be under no express obligation to

⁵ *Id*, ¶ 27.

⁶ Id; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at ¶ 11 (rel. Aug. 8, 1996) (Local Competition Order).

⁷ Notice, ¶ 26.

⁸ 47 U.S.C. § 251(h)(2)(B).

interconnect, unbundle, and resell its network elements to competing providers. Such an interpretation would seriously hinder efforts to develop competitive markets in Guam. MCI therefore supports the Commission's tentative conclusion that section 251(h)(2)(B) is satisfied when a LEC serves all or virtually all subscribers in an area that did not receive local service from a NECA member as of the date of the 1996 Act.⁹

Divergence from the "plain meaning" rule of statutory construction would further Congressional intent to open all local markets to competition by subjecting dominant LECs, such as GTA, to the interconnection, unbundling, and resale requirements in section 251. As the Commission acknowledged, there is ample case law in support of such action where literal application of a statute will produce a result that is substantially at odds with Congressional intent.¹⁰ In this instance, a literal application of section 251(h)(2)(B) would not encompass GTA and would therefore exempt it from section 251 obligations. This would be flatly inconsistent with Congress' intent that dominant LECs, which essentially serve virtually all subscribers in their service areas, be subject to competition and required to facilitate the entry of competitors.

Generally, the plain meaning of a statute will be conclusive, except in the "rare case . . . where the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." Further, even where a statute is not ambiguous, but a literal interpretation would produce absurd results, as in this instance,

⁹ Id. at ¶ 31. The Commission has previously considered an incumbent LEC as one that "serves virtually all subscribers in its local serving area..."); see also Local Competition Order, ¶ 10.

¹⁰ Notice, ¶ 29, n. 79.

¹¹ See e.g., United States v. Ron Pair Enterprise, Inc., 489 U.S. 235, 242 (1989) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

the purpose of the intended legislation is followed.¹² A strict reading of section 251(h)(2)(B) would result in an extraordinary exemption from section 251 obligations for a LEC that the statute was intended to include.

GTA is precisely the type of LEC at which section 251 is directed. Congress intended that section 251 apply to LECs "possessing market power in the provision of telephone exchange service or exchange access service in a particular local area to negotiate in good faith and to provide interconnection with other telecommunications carriers." Further, Congress directed that the Commission will determine which LECs have market power by evaluating market share and the number of competing providers in the service area. As the only LEC serving consumers in Guam, GTA has one—hundred percent of the market share. GTA undoubtedly possesses market power in its service area and should therefore be deemed to satisfy section 251(h)(2)(B) as a LEC that provides local exchange service to all or virtually all of the subscribers in its service area. 15

The Commission has traditionally determined whether a carrier is dominant by whether it has market power, which includes having control over essential bottleneck facilities, no competing provider of the same services, and the ability or incentive to engage in anticompetitive conduct.¹⁶ As the only LEC on the Territory of Guam, not

¹² United States v. American Trucking Associations, 310 U.S. 534, 543 (1967).

¹³ S. Conf. Rep. No. 104-23, 104th Cong., 1st Sess., 19 (1996) (Senate Report); H.R. Rep. No. 104-458, 104th Congress, 2nd Sess., 117 (1996) (Conference Report).

¹⁴ *Id*.

¹⁵ Cf. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 F.C.C. 2d 1, 22-23 (1980) (the Commission determined that "the Bell system controls access to over 80% of the nation's telephones. Since many of AT&T's competitors must have access to this network if they are to succeed, AT&T possesses control of bottleneck facilities" and therefore "must be treated as dominant.").

¹⁶ *Id.* at 20-21.

only does GTA control the only existing infrastructure that serves virtually all subscribers in Guam, but GTA is not subject to competition in the local market. Further, as has been established in a prior proceeding, GTA has demonstrated the ability and incentive to act anticompetitively.¹⁷

GTA operates the twenty-ninth largest local telephone network in the United States, serving approximately 67,000 access lines.¹⁸ Access to GTA's essential bottleneck facilities is critical for new entrants to compete for the provision of local exchange services. In addition to network elements, GTA controls access to rights-of-way and collocation. The Commission has realized that "elimination of these obstacles is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets." Given GTA's dominance on the Territory of Guam, exempting GTA from the interconnection, unbundling, resale and other requirements imposed on incumbent LECs would frustrate Congress' goals to open local markets using these mechanisms.

The Commission cannot rely on GTA to voluntarily assume the obligations imposed upon incumbent LECs in section 251.20 As the Commission has acknowledged,

¹⁷ <u>Jurisdiction Order</u>, 7 FCC Rcd at 4025 (the Commission concluded that the "record in this proceeding is filled with allegations of unjust, unreasonable, and unreasonably discriminatory acts by GTA, many of which are uncontested" and "it establishes a pattern and practice of unjust and unreasonable behavior on the part of GTA, in violation of the Communications Act.").

¹⁸ In April and May of 1996, for example, GTA received two notices requesting interconnection and negotiations in connection with the resale of GTA services. <u>Guam Telephone Authority</u>, <u>Petition for Declaratory Ruling to Participate in the National Exchange Carrier Association</u>, <u>Inc.</u>, CCB/CPD File No. 96-29 at n. 4 (rel. May 12, 1997). Rather than enter into negotiations, GTA instead claimed that it may be exempt from any resale obligations as a "rural" LEC. GTA subsequently filed a petition with the Public Utilities Commission in Guam for a declaratory ruling under section 3(37) and 251(h), which has ultimately resulted in this lengthy proceeding before the Commission.

¹⁹ Local Competition Order, ¶ 18.

²⁰ Notice, ¶ 33.

"an incumbent LEC has little incentive to assist new entrants in their efforts to secure a greater share of that market." Absent a Commission ruling classifying GTA as an incumbent LEC subject to the obligations of section 251, GTA's control over the only existing infrastructure, rights-of-way and collocation in Guam would bar potential competitors from entering the local market in Guam.

Further, because the Commission has concluded that GTA is a "rural telephone company" within the meaning of section 3(37) of the Act, the importance of defining GTA as an incumbent LEC is underscored. As a rural LEC, GTA would automatically be exempt from the procompetitive obligations imposed upon incumbent LECs in section 251. The Commission has determined, however, that "exemption . . . of the section 251 requirements . . . be the exception rather than the rule." Indeed, the Commission further determined that "Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service." The Commission's proposed construction of section 251(h)(2) is consistent with the procompetitive goals of the Act.

C. Treatment of GTA as an Incumbent LEC Would Serve the Public Interest and Further the Goals of Section 251

As the Commission noted, treating GTA as an incumbent LEC would promote competition in local and exchange access service markets in Guam, which in turn, would

²¹ Local Competition Order, ¶ 10.

²² 47 U.S.C. § 251(f).

²³ Local Competition Order, ¶ 1262.

²⁴ Id.

serve the public interest, convenience, and necessity.²⁵ The primary purpose of section 251 is to foster competition that would not otherwise develop.

Congress has determined that competition in the local exchange market is in the public interest. Competition is beneficial not only because it will eliminate the incumbent LEC's control over essential facilities in the local and access markets, but because "of the social and economic benefits competition will bring to consumers of local services." As a territory of the United States, Guam consumers are to receive the same benefits of competition established pursuant to the Act as other consumers. Indeed, the Commission has declared that "the residents of Guam are just as entitled to the benefits of competition in telecommunications as any other Americans." GTA should be treated as an incumbent LEC and required to comply with the procompetitive obligations of section 251(c) for the development of competition and benefit of the consumers in Guam.

III. CONCLUSION

As the Commission repeatedly stated in its Notice,²⁸ GTA is the sole provider of local service in Guam, possesses economies of scale, connectivity, and density, and controls access to the local network. If GTA is not treated like an incumbent LEC and expressly required to open its network to competition, it is very likely that competition will not develop in Guam. Congress did not intend to exclude Guam residents from

²⁵ Notice, ¶ 40.

²⁶ Local Competition Order, ¶ 4.

²⁷Jurisdiction Order, 7 FCC Rcd.at 4026.

²⁸ Notice, ¶¶ 25, 27, 33, 37, and 40.

enjoying the benefits of competition. Accordingly, MCI urges the Commission to treat the Guam Telephone Authority as an incumbent local exchange carrier for purposes of section 251.

MCI TELECOMMUNICATIONS CORPORATION

Kecia Boney

Lisa B. Smith

1801 Pennsylvania Avenue, N.W.

Washington, D.C. 20006

(202) 887-3040

Date: July 7, 1997

10